

# **POLICY ON SUPPLEMENTAL ENVIRONMENTAL PROJECTS**

## **I. INTRODUCTION**

This policy supplements the 1997 Enforcement Response Guidance (ERG), and should be read in conjunction with it. All applicable sections of the ERG, including the definitions at section II therein, are expressly incorporated by reference.

Historically, Supplemental Environmental Project (“SEPs”) have played an important role in MassDEP settlements. In appropriate cases, implementation of a SEP furthers MassDEP’s compliance and enforcement goals and provides an increased level of environmental protection.

MassDEP staff can suggest that a violator consider a SEP that is consistent with the guidelines set forth below.

## **II. DEFINITION AND PURPOSE OF SEPs**

SEPs are environmentally beneficial projects, the implementation of which primarily benefit public health, safety and welfare, and the environment.

In settlement of environmental enforcement cases, MassDEP will require regulated entities to achieve and maintain compliance with the environmental laws and regulations administered by MassDEP, and may require them to pay an administrative penalty. Penalties play an important role in environmental protection by deterring violations and ensuring that violators do not obtain an unfair economic advantage over their competitors who made the necessary expenditures to comply in a timely manner.

In addition to the assessment of penalties, the performance of SEPs can also play a role in furthering MassDEP’s goals to protect public health, safety and welfare, and the environment. SEPs may be particularly appropriate to further the objectives in the statutes administered by MassDEP, and to achieve other policy goals, including the promotion of pollution prevention and environmental justice. In certain enforcement cases, SEPs may be included as an appropriate condition of settlement, and, as such, may be considered as a factor in mitigating a penalty.

This settlement policy is not intended for use by MassDEP, regulated entities or administrative law judges at a hearing or in a trial. It does not apply to settlements of claims for stipulated penalties or to the collection of suspended penalties.

## **III. LEGAL GUIDELINES**

### **A. AGENCY DISCRETION**

Acceptance of a SEP as part of a settlement is solely within the discretion of MassDEP. MassDEP is under no obligation to approve any SEP.

### **B. ADMINISTRATIVE CONSENT ORDER**

As an express condition of any SEP approval, the regulated person or entity seeking the SEP will be subject to the terms of an Administrative Consent Order (“ACO”). Provisions of such an ACO will require, inter alia, the timely submission of certain reports required by MassDEP. These may include, for example, SEP designs and SEP implementation plans. ACOs will require timely verification of SEP completion.

### **C. ‘GEOGRAPHICAL LOCATION’ AND ‘NEXUS’ REQUIREMENTS**

Where feasible, a SEP approved by MassDEP must be located in the geographical area where the violations occurred. In addition, any SEP approved by MassDEP must have a sufficient ‘**nexus**’, meaning that it must be substantially related to the type of violation that is the subject of the administrative enforcement action.

- 1) A nexus relationship can be shown where the proposed SEP:
  - a) advances at least one of the declared objectives of the environmental statutes that form the basis of the underlying enforcement action, although a SEP can neither be inconsistent with, nor reduce the stringency or timeliness of requirements of environmental statutes and regulations; and either
  - b) remediates or reduces the actual or probable overall environmental or public health impacts or risks to which the violation at issue contributes; or
  - c) is designed to reduce the likelihood that similar violations will occur in the future.

### **D. AGENCY’S LIMITED ROLE**

MassDEP’s role relative to the performance of any SEP is limited. In particular:

- 1) MassDEP can have no role in managing or otherwise administering funds that may be set aside or escrowed for performance of a SEP, although MassDEP retains regulatory authority to oversee a project, ensure that it is implemented pursuant to the provisions of a consent order, and establish a basis for legal recourse if the project is not adequately performed;
- 2) A SEP may not provide MassDEP with additional resources with which to perform any activity for which public funds are specifically appropriated, nor can a SEP appear to be an expansion of an existing program administered by MassDEP.
- 3) A SEP must be performed either by the regulated entity itself (using its own employees) and/or by its by contractors or consultants. Non-profit organizations, such as universities and public interest groups, may function as contractors or consultants.

## **IV. SEP GENERAL REQUIREMENTS AND FACTORS**

## **A. SEP NOT REQUIRED BY REGULATION**

Since the main purpose of this policy is to obtain public health or environmental benefits that may not otherwise have occurred outside the terms of the settlement, proposed projects cannot otherwise be required by regulation.

## **B. SEP IS ‘POST-VIOLATION’**

Since any proposed project that is considered by MassDEP arises in the context of and as a result of MassDEP enforcement, no project that has been authorized or undertaken by the regulated entity prior to the identification by MassDEP of the underlying violation will be approved.

## **C. SEP MITIGATION FACTORS**

Consistent with penalty assessment criteria at M.G.L. c. 21A and the implementing regulations at 310 CMR 5.25, MassDEP may consider “good faith” and “public interest” as factors in mitigating a penalty. MassDEP may consider these factors in the context of a SEP when a regulated entity demonstrates that it:

- 1) has the financial ability to correct all noncompliance; and
- 2) either has remediated any harm it caused, is capable of completing future remedial work, or is in current compliance with the requirements of M.G.L. c. 21E and/or other remedial requirements.

If a regulated entity claims that payment of any penalty or the performance of a SEP will impede its ability to comply or perform a remedial measure, then MassDEP will not consider mitigating the penalty through performance of a SEP. (MassDEP may, however mitigate a penalty on the basis of other penalty mitigation policies or factors required to be considered pursuant to M.G.L. c. 21A, sec. 16 and the implementing regulations at 310 CMR 5.25.)

## **V. ENVIRONMENTAL JUSTICE**

Certain segments of the Commonwealth's population are disproportionately burdened by pollutant exposure. Emphasizing SEPs in communities where environmental justice issues are present helps to ensure that persons who spend significant portions of their time in areas, or depend on food and water sources located near where the violations occur, would be protected. “Environmental Justice” is an overarching MassDEP goal, and not a specific technique or process. As such, it does not fall within a SEP Category, but rather is a compelling reason for the approval and implementation of SEPs in communities where environmental justice may be an issue, and where there exists the requisite nexus described above in section III .

## **VI. GENERAL SEP CATEGORIES**

### **A. POLLUTION PREVENTION PROJECTS**

#### **1) Pollution Assessment**

A pollution prevention project may entail or include a pollution prevention assessment that is a systematic, internal review of processes and

operations that is designed to provide information and opportunities to reduce the use, production, and generation of toxic material and other wastes.

For the purpose of determining the actual SEP cost, and thereby determining the extent to which a penalty may be mitigated, credit may be given only for the direct costs associated with pollution prevention SEP assessment. Because future costs may be too difficult to calculate, credit for costs to be incurred for implementing actions or recommendations identified in the assessment can be given where such costs are clearly identified and earmarked at the time of settlement.

## **2) Source Reduction**

A pollution prevention project can also be one that reduces the generation of pollution through "source reduction," i.e., any practice that reduces the amount of any hazardous substance, pollutant or contaminant entering any waste stream or otherwise being released into the environment, prior to recycling, treatment or disposal.

Examples include:

- input substitution and product reformulation, such as replacing a toxic substance or raw material with a non-toxic or significantly less toxic substance;
- redesigning or modernizing operations and equipment; or
- improving operation and maintenance controls.

## **B. POLLUTION REDUCTION PROJECTS**

If the pollutant or waste stream already has been or will be generated or released, a pollution reduction approach to capture such pollutant or waste may after it has been released be appropriate. Pollution reduction may include the installation of more effective end-of-process control or treatment technology. This also includes "out-of-process recycling," wherein industrial waste collected after the manufacturing process and/or consumer waste materials are used as raw materials for production off-site, reducing the need for treatment, disposal, or consumption of energy or natural resources. Such a project must significantly decrease the release of pollutants to the environment.

## **C. ENVIRONMENTAL ENHANCEMENT PROJECTS**

Environmental enhancement projects include conservation, protection, and restoration projects that go beyond addressing damage caused by the violation. They conserve and protect the condition of the geographic area, ecosystem, or watershed that was adversely affected.

Environmental enhancement projects may be used to protect or restore natural environments, such as ecosystems or watersheds, and to retrofit or reduce the environmental impact of man-made environments, such as facilities and buildings. Projects in this category may include, but are not limited to installation of, or retrofitting facilities with, best management practices (BMPs), water conservation projects, land purchase and donation for conservation and recreational purposes, creation of conservation easements, wetlands restoration and replication projects, and remedial actions conducted pursuant to M.G.L. Chapter 21E.

## **D. ENVIRONMENTAL EDUCATION AND AWARENESS PROJECTS**

Consistent with the nexus requirement for all SEPs, achieving added environmental benefit in a particular sector can sometimes be achieved with appropriate education and awareness projects that are specifically tailored to advance or enhance environmental protection. MassDEP retains the right to deny approval for any such SEP that, in its view, can not be adequately implemented, is overly broad, or does not otherwise significantly further MassDEP's interest in benefiting public health, safety, welfare, and the environment.

Environmental education and awareness projects can provide training, publications, or technical support to the regulated community or to the public at large for the purpose of achieving compliance with environmental regulations; reducing the generation, release, or disposal of pollutants beyond legal requirements; or educating the public about environmental protection and resource conservation.

Any material proposed for publication pursuant to an environmental education and awareness SEP is subject to MassDEP review and approval. In addition, any such proposed material must include an express statement that the project has been undertaken as part of settling an enforcement action brought by MassDEP.

## **E. SCIENTIFIC RESEARCH, MONITORING, AND DATA COLLECTION PROJECTS**

A scientific research, monitoring, and/or data collection project can further an understanding of the environmental conditions of a natural resource or the methods that can be employed to restore the resource. Projects in this category may include public health projects that evaluate human health impacts where pollution has been released into the environment.

## **F. EMERGENCY PREPAREDNESS AND COMPLIANCE PROJECTS**

These projects enable local communities in the geographical area of the violation to plan for and effectively respond to an event that may threaten public health, safety, or the environment. Projects can include public outreach, education or assistance regarding associated environmental risks in the community.

## **VII. SEP EXAMPLES**

MassDEP staff can encourage regulated entities to consider an acceptable SEP and can direct such entities to SEP lists and related databases, like those described below, as well as to other SEP related sources of information that may be maintained by EPA and other government related entities. MassDEP is under no obligation, however, to approve any particular SEP proposed by any particular entity.

### **A. PREVIOUSLY APPROVED SEPs**

Consistent with the goal of achieving enhanced environmental benefit and protection, MassDEP has approved appropriate SEPs in a variety of negotiated settlements. Some recent examples of such SEPs can be accessed at <http://mass.gov/dep/service/sepapp.htm>

## **B. INITIATIVES AS A SOURCE OF SEPs**

Aspects of the requisite nexus for an appropriate SEP can sometimes be found by applying the facts of a particular enforcement case against MassDEP's current initiatives, priorities and activities. For example, MassDEP is committed to encouraging energy conservation, including the promotion of green building and the use of renewable energy sources. Information on such agency matters can be found at [mass.gov/DEP](http://mass.gov/DEP) (see various links to Bureaus; Programs; and Enforcement and Compliance.)

## **VIII. INCENTIVES FOR PERFORMING A SEP**

Where a proposed SEP falls within the guidelines and parameters set forth in this policy, MassDEP may exercise its enforcement discretion by providing the following incentives to encourage the performance of SEPs.

When determining a settlement of the penalty amount, MassDEP will consider the costs to be incurred by a regulated entity in performing a SEP, a process involving the following steps:

- 1) MassDEP will calculate the full appropriate penalty, including economic benefit;
- 2) The Respondent will prepare for MassDEP approval a report identifying and explaining the basis for the cost of the SEP.
- 3) After approving the basis for the SEP Cost, MassDEP will compare the SEP Cost to the full appropriate penalty amount to determine what portion of the penalty may be mitigated by the SEP.

Unless MassDEP determines that a particular SEP is subject to special consideration, as described in Section IX below, any proposed SEP must collect at least 25% of the full appropriate penalty amount or collect the economic benefit, whichever is greater, even in cases where the SEP cost may not be fully offset.

MassDEP may collect more than the portion of the full appropriate penalty amount where it must allocate MassDEP resources to monitoring and reviewing implementation of the SEP; or where the SEP is likely to generate a cost savings to the regulated entity (i.e.: pollution prevention project).

## **IX. SPECIAL SEP CONSIDERATIONS**

### **A. GOVERNMENTAL ENTITIES**

Subject to MassDEP's discretion, and on a case-by-case basis, up to 100% mitigation of a penalty may be appropriate in certain enforcement action involving local or state governmental entities. Request for approval of such a SEP shall be made to the Director of the Office of Enforcement and General Counsel, in consultation with the Deputy Commissioner, prior to consideration and approval by the Commissioner.

### **B. SIGNIFICANT ENVIRONMENTAL BENEFIT**

When a Regional Director determines that the cost of implementing a proposed SEP is greater than the assessed penalty amount and will provide environmental benefit that significantly

outweighs the benefit to be derived from the deterrent effect of a cash penalty, a SEP may be considered for up to 100% mitigation of the penalty. Request for approval of such a SEP shall be made to the Director of the Office of Enforcement and General Counsel, in consultation with the Deputy Commissioner, prior to consideration and approval by the Commissioner.

#### **X. FAILURE OF A SEP AND STIPULATED PENALTIES**

MassDEP will, pursuant to the terms of an ACO, require the regulated entity to pay a stipulated penalty for failure to fully or timely complete a SEP in a satisfactory manner. The determinations of whether the SEP has been satisfactorily completed (i.e., pursuant to the terms of the agreement) and whether the regulated entity has made a good faith, timely effort to implement the SEP is in the sole discretion of MassDEP.